ship and a denial of justice than one which says that the sheriff's statement as to what is your "usual place of abode" is **conclusive and binding on you.** But stop! That is not all. After you have been sold out under execution sued out upon a judgment recovered upon such process, and you are financially ruined, you may then turn around and sue the sheriff. Oh! Justice, what a travesty upon thee!

We cannot grant the premises taken by Mr. Minor in 4 Min. Insts., pt. 1, p. 1042, in which he says, in discussing this rule: "It is no doubt a hardship upon one against whom a judgment is rendered upon such false return, he having had no knowledge of the pendency of the suit, and no opportunity to defend himself; but, on the other hand, it would occasion delays and hindrances in the administration of justice, which would work still greater mischiefs, if it were allowed to impeach the returns of sworn officers and so annul the proceedings founded thereon."

CONTINENTAL CASUALTY CO. v. LINDSAY.

Nov. 17, 1910.

[69 S. E. 244.]

1. Insurance (§ 539*)—Beneficiary—Notice of Death of Insured.—Where the beneficiary of a casualty policy was ignorant of its existence till several months after the insured's death, but immediately gave the insurance company notice of death when the policy was found, the notice was sufficient, although the policy prescribed that it should be forfeited unless the beneficiary should within 15 days after the accident give notice of it, since all the law requires in compliance with the terms of the policy as to notice and proof of loss is that they should be made within a reasonable time after the accident.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1328; Dec. Dig. § 539.*]

2. Insurance (§ 599*)—Waiver of Notice—Proof of Death.—A letter to a beneficiary of a casualty company in reply to a request for a blank on which to make out proofs of death, stating that the claim is considered altogether invalid, and the policy forfeited, but that the blanks are sent as a courtesy to be used as desired, was a waiver of any strict compliance with the condition in the policy requiring the preliminary notice of death and proof of loss.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1391, 1392; Dec. Dig. § 559.*]

3. Insurance (§ 265*)—Warranty—What Constitutes.—Where, in a written application for insurance, the insured is asked to state the name, relationship and residence of the beneficiary, to which the in-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

sured replies that it is his wife, the policy will be avoided in case it appears that the woman designated was not his wife, but one with whom he is living in illicit relations, the information requested being most material and it being agreed that the answer to the question should constitute a warranty.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 560; Dec. Dig. § 265.*]

4. Insurance (§ 265*)—Warranty—Statute Affecting.—Acts 1906, p. 139, § 28, providing that statements or descriptions in any application for a policy of insurance shall be deemed representations and not warranties, unless such representations are material, will not cure the effect of a misrepresentation of an insured in his application that the beneficiary was his wife, such representation being material.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 560; Dec. Dig. § 265.*]

5. Insurance (§ 654*)—False Warranty—Admissibility of Evidence.—In an action by a beneficiary to recover on a casualty policy, where it appeared that the insured had warranted that his beneficiary was his wife, evidence that she was merely his concubine was improperly rejected.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1680; Dec. Dig. § 654.*]

6. Insurance (§ 669*)—Action to Recover—Instruction—False Warranty—Willfully Made.—In an action by a beneficiary under a casualty policy, where the beneficiary testified that she was never legally married to the insured, it was error to refuse to charge that, if the jury believed from the evidence that the insured willfully misrepresented in his application that his beneficiary was his wife, they should find for defendant.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1775; Dec. Dig. § 669.*]

Error to Circuit Court, of Albemarle County.

Action by Willie A. Lindsay against the Continental Casualty Company. Judgment for plaintiff, and defendant brings error. Reversed.

HARRISON, J. This action was brought by Willie A. Lindsay to recover of the Continental Casualty Company the amount of an accident insurance policy taken out by James O. Lindsay, who was, about six months thereafter, accidentally killed. The plaintiff was named in the policy as the beneficiary thereunder, and described therein as the wife of the insured.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

There was a verdict and judgment in favor of the plaintiff which we are asked to review.

We are of opinion that when the existence of an insurance policy is not known for several months after the death of the insured, and the beneficiary therein, as soon as the policy is found, gives notice to the company, then all has been done that could be required under the circumstances. It would be a harsh rule that would forfeit the policy because the beneficiary has not given notice within 15 days after the accident, as prescribed in the policy, when she did not know of its existence for several months thereafter. Compliance with the terms of a policy as to notice and proof of loss within a reasonable time after knowledge of its existence under all the circumstances of the particular case is all that is required. Accident Association *v.* Byers, 62 Neb. 673, 87 N. W. 546, 55 L. R. A. 291, 89 Am. St. Rep. 777; Solomon *v.* Fire Ins. Co., 160 N. Y. 595, 55 N. E. 279, 46 L. R. A. 683, 73 Am. St. Rep. 707; May on Ins. vol. 2, § 462. See, also, Wooddy *v.* O. D. Ins. Co. 31 Grat. 362, 31 Am. Rep. 732.

We are further of opinion that when a loss has occurred and the insurance company has been notified thereof in writing, as soon as the policy is found, the policy is not forfeited for failure to furnish proof of loss where, in answer to a request by the beneficiary for a blank to make out such proofs, the company replies: "I note your request for blank that you may make proof of loss. We do not request you to make any proof of loss as we believe that your claim is already utterly invalid and that it will be an useless expenditure of effort on your part to submit proof of death, but as you ask for the blank it is herewith inclosed. It is sent to you as an act of courtesy that you may make such use of it as you may deem to be for your client's best interests."

This refusal of the company to recognize any claim renders the delivery of notice and proof of loss a useless ceremony, and is treated as waiving a strict compliance with the condition as to the preliminary notice and proof, both in respect to form and time. A distinct denial of liability and refusal to pay on the ground that there is no liability is a waiver of the condition requiring proof of loss. Travelers' Ins. Co. *v.* Harvey, 82 Va. 949, 5 S. E. 553. Language indicating a refusal to pay or to recognize any claim whatever could not be stronger than that used by the company in response to the application for a blank proof of loss, viz., "We do not request you to make any proof of loss as we believe that your claim is already invalid, and that it will be a useless expenditure of effort on your part to submit proof of death."

We are further of opinion that in a written application for insurance, where the insured is asked to give the name, relationship and residence of the beneficiary, and he states in reply that the beneficiary is his wife, and it turns out that she is not his wife, but a woman with whom he is living in illicit cohabitation, such false statement with respect to his relation to the beneficiary avoids the policy. The question asked by the company called for most material information that might well have a very important bearing upon the issuance of the policy, and it was therefore agreed that the representation made in answer thereto should constitute a warranty. This is done for the purpose of ascertaining the manner of life, the environments and habits of those who apply for insurance, that the company may reject the application of those deemed to be undesirable risks. It cannot be doubted that a man who, in violation of law, is living in lewd and lascivious cohabitation with a woman is a less desirable risk than one who is leading a regular and clean life. The company has, by its contract, fixed its estimate of the importance of a truthful answer to the question calling for the relation between the applicant and the proposed beneficiary of the policy, and the applicant has accepted the test and agreed that his answer shall constitute a warranty of the fact stated. It would be a violation of the legal right of the company to take away its power to make its opinion the standard of what is material, and to leave that point to the determination of a jury. Jeffries *v.* Life Ins. Co., 22 Wall. 47, 22 L. Ed. 833; Gaines *v.* Fidelity & Casualty Co., 188 N. Y. 411, 81 N. E. 169.

In the case last cited, Judge Gray, speaking for the court, says: "The insurer was entitled to know the actual relationship which the person, for whom the assured desired the benefit of the insurance contract, sustained to him, for it bore upon the risk which it was to assume. The inquiry related to the risk; the statement in the answer was made a warranty to be contained in the policy, and it having been determined that the statement was untrue, the right to recover upon the contract was forfeited."

The Acts of 1906, p. 139, § 28, does not control in this case, because it clearly appears that the answer in question was material.

It follows from what has been said that the Circuit Court erred in excluding the testimony offered by the defendant company to show the falsity of the answer made by the assured to the question calling for his relation to Willie A. Lindsay, the beneficiary named in the policy. It was also error to refuse to give instruction asked for by defendant company, which

told the jury that if they believed from the evidence that the representation made by James O. Lindsay to the defendant relative to the relationship existing between himself and the proposed beneficiary, Willis A. Lindsay, was willfully false, then they must find for the defendant. Willie A. Lindsay had admitted on her cross-examination that she was never legally married to the assured, and if the jury believed that he had falsely represented his relation to her, the policy was thereby forfeited, and there could be no recovery.

The judgment must be reversed, the verdict set aside, and the cause remanded for a new trial not in conflict with this opinion.

Reversed.

Note.

This case seems to be one of first impression in this state on several points. That upon which the case turns, however, is the effect of a willful false statement in an application for an accident insurance policy, made in answer to a question as to the relationship borne to the proposed beneficiary, where it was agreed that the answer to the question should constitute a warranty, and where the statement was that the beneficiary was the applicant's wife, whereas in truth the relationship was an illicit one.

The ruling of the court on this point, that the policy is avoided, is supported by the weight of what authority there is, and by reason as well. As an additional case taking this position, we cite Van Cleave *v.* Union, etc., Co., 82 Mo. App. 668.

So where a married man, in an application for life insurance, avers that he is single. Jeffries *v.* Union, etc., Co., 1 Fed. 450.

Or a married man states himself to be a widower. United Brethren, etc., Soc. *v.* White, 10 Pa. 12.

It has been held, however, that the statement in an application for accident insurance, "Write policy payable, in case of death under the provisions of the policy, to L., whose relationship to me is that of wife," is not a warranty that the beneficiary is insured's wife, or a material representation, but a mere description of the person. Lampkin *v.* Travellers' Ins. Co., 11 Colo. App. 249, 52 Pac. 1040.

This was on the ground that it was not even a representation in the form that it was made. On a previous hearing of this case the same court had held that the policy was avoided by the false statement. See 38 Pac. 335.

This case also held that a woman living with a man as his wife, though she is not such, has an insurable interest in him. Lampkin *v.* Travellers' Ins. Co., 11 Colo. App. 249, 52 Pac. 1040.

Independently of statute, the misstatement of a fact made a warranty by the terms of the contract, avoided the policy whether material to the risk or not. Home Life Ins. Co. *v.* Sibert, 96 Va. 403, 31 S. E. 519; Metropolitan Ins. Co. *v.* Rutherford, 98 Va. 195, 35 S. E. 361.

By § 3344a, p. 1766, of the Code (1904), even though made a warranty, an untrue statement does not bar recovery unless clearly proved to have been willfully false or fraudulently made, or that it was material.

Directly involved also is the question, answered in the negative,

as to whether the Act of 1906, p. 139, § 28, would prevent such statement from being a warranty.

This statute, which now appears in Pollard's Supplement to the Code (1910) as § 28 of the act concerning insurance companies (p. 602), and appears to take the place of § 3344a, only applies where the misrepresentation is not material, as held in the principal case, and does not relieve from the forfeiture consequent upon a false statement such as that made in the principal case.

The decision as to the nonapplication of the statute referred to is borne out fully by Van Cleave *v.* Union, etc., Co., 82 Mo. App. 668, where it is held, under the Missouri statute providing that no misrepresentation in obtaining a policy of insurance on the life of any person shall be deemed material, or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or the event on which the policy is to become due and payable, that, where the parties by their contract agreed that the statements in the application for insurance should constitute warranties, a statement that the beneficiary named in the policy was the wife of the insured, when she was in fact his mistress, avoided the policy, and § 5849 had no application, since the representation was fraudulent, and made with an intention to deceive, and was made material to the risk by the agreement of the parties. Van Cleave *v.* Union Casualty, etc., Co., 82 Mo. App. 668.

Of course these principles would be equally as applicable to an ordinary life policy as to an accident policy like the one in the principal case.

As to the failure to give notice of loss within the specified time, there is a rather peculiar case, in which it was held that failure to give immediate notice of an accident to an employers' liability insurance company, was not excused by want of knowledge of the policy by one of two mine operators for whose benefit the insurance was taken by the other, and want of knowledge of the accident by the latter. The court said that this condition of affairs was brought about solely by the neglect of one of the insured to notify the other of the contract. Deer Trail, etc., Co. *v.* Maryland Casualty Co. (Wash.), 67 L. R. A. 275.

The decision is an important one, and undoubtedly correct, and will no doubt be welcomed by the insurance companies, as there have not been many precedents on these points.

J. F. M.

IRVINE *v.* RANDOLPH LUMBER CORPORATION et al.

Nov. 17, 1910.

[69 S. E. 350.]

1. Courts (§ 157*)—Court of General Jurisdiction.—The circuit court of the city of Richmond is a court of general jurisdiction.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 157.*]

2. Judgment (§ 516*)—Jurisdiction—Collateral Attack.—A creditor

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.